

STATE OF MICHIGAN
COURT OF APPEALS

JAMES A. HOOVER,

Plaintiff-Appellant,

v

TOWNSHIP OF DENTON, JOSEPH FAINO, and
BRUCE FORMAN,

Defendants-Appellees.

UNPUBLISHED

April 8, 2004

No. 242908

Roscommon Circuit Court

LC No. 01-722645-CZ

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants summary disposition and dismissing plaintiff's claim for intentional infliction of emotional distress. We affirm.

Defendant employed plaintiff as a sexton.¹ Plaintiff's duties included grave digging and the subsequent filling of graves. On March 18, 2000, plaintiff was preparing a lot (lot 2) for burial when he struck a child coffin with the backhoe that he was operating. As a result, the remains inside the coffin were exposed. After learning that plaintiff had uncovered remains in lot 2, defendant Faino ordered plaintiff to prepare lot 3, which is adjacent lot 2, to place the remains found in lot 2 into lot 3. While preparing lot 3, plaintiff again struck a child coffin with the backhoe he was operating, which exposed the remains that were inside the coffin. Defendant Faino obtained new coffins to replace the damaged coffins and ordered plaintiff to prepare lot 5 to place the lot 2 remains. Defendant Faino also ordered plaintiff to return the lot 3 remains to lot 3, and then cover lots 1-5 with dirt so that "it doesn't look like anything has been disturbed in these other lots."

The next week plaintiff visited defendant Faino. Plaintiff expressed concern over the disinterment and reinterment of two infant remains, and expressed that he had emotional problems that resulted from his knowledge that the remains from lot 2 were those of his friend's child. Defendant Faino sent plaintiff to a minister for counseling. After meeting with the

¹ A sexton is defined as "an official who maintains a church building and its contents, rings the bell, etc." Random House Webster's College Dictionary.

minister and discussing his concerns, plaintiff told defendants Faino and Forman that counseling did not help. Defendants Faino and Forman allegedly threatened to terminate plaintiff's employment if he told anyone of the digging incidents.

On appeal, plaintiff argues that the trial court improperly granted defendants' partial summary disposition on his claim for intentional infliction of emotional distress arising from the disinterment of the remains in lots 2 and 3.² We disagree.

A motion for summary disposition on the basis that a claim is barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA) challenges subject matter jurisdiction and is properly brought pursuant to MCR 2.116(C)(4). *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000).³ A court's grant of summary disposition pursuant to MCR 2.116(C)(4) is reviewed de novo. *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001). Review pursuant to MCR 2.116(C)(4), requires deciding whether the pleadings indicated "the defendant was entitled to judgment as a matter of law" or documentary evidence indicated no genuine issue of material fact. *Id.*

The exclusive remedy for mental and physical work-related injuries under the WDCA is not applicable if:

an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. [MCL 418.131(1).]

Here, plaintiff's allegations fail to establish that defendants intended to cause plaintiff emotional harm by directing him to excavate lots 2 and 3. There are no allegations that defendants knew that plaintiff would disinter bodies by excavating the lots. Indeed, before excavating, plaintiff took measures, albeit unsuccessful, to determine for himself whether lots 2

² The trial court specifically held that plaintiff's action for negligent/intentional infliction of emotional distress was dismissed pursuant to MCR 2.116(c)(8) "to the extent that it seeks damages based solely upon the digging incidents in which plaintiff allegedly struck coffins and disinterred bodies." Thus, the trial court granted defendants partial summary disposition.

³ On February 15, 2002, the trial court granted defendants partial summary disposition pursuant to MCR 2.116(c)(8). Granting summary disposition under an incorrect subpart of a court rule is not fatal if review may occur under the correct subpart. *Detroit News, Inc v Detroit Policemen and Firemen Retirement System*, 252 Mich App 59, 66; 252 NW2d 59 (2002), quoting *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). Here, review pursuant to MCR 2.116(C)(4) involves a review of the pleadings to determine whether defendant was entitled to judgment as a matter of law, and review pursuant to MCR 2.116(C)(8) involves review of the pleadings to determine whether a claim is unenforceable as a matter of law. Thus, partial summary disposition under MCR 2.116(C)(8) was not fatal. See *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Detroit News*, *supra* at 66.

and 3 contained coffins. Absent defendants' knowledge that plaintiff would disinter bodies by excavating the lots and that such disinterment was certain to cause injury to plaintiff, plaintiff cannot allege facts that would bring this claim within MCL 418.131(1), the statutory exception to the WDCA. Plaintiff's remedy for any emotional distress from the disinterment of the remains in lots 2 and 3 is therefore governed by the WDCA. *Bock, supra* at 710-711.

Plaintiff also argues that the trial court improperly dismissed his claim for intentional infliction of emotional distress because he presented sufficient evidence that defendants intended to injure plaintiff by ordering him not to tell anyone of the incidents.

Again, a motion for summary disposition on the ground that a claim is barred by the exclusive remedy provision of the WDCA challenges subject matter jurisdiction and is properly brought pursuant to MCR 2.116(C)(4).⁴ *Harris, supra*. Review pursuant to MCR 2.116(C)(4), requires deciding whether the pleadings indicated "the defendant was entitled to judgment as a matter of law" or documentary evidence indicated no genuine issue of material fact. *Bock, supra* at 710.

It is well settled that MCL 418.131 requires that "the employer must deliberately act or fail to act with the purpose of inflicting injury upon the employee." See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). In addition, actual knowledge, as opposed to constructive knowledge, is required to fall within the statute's exception. *Id.* at 173-174.

Here, plaintiff did not establish that defendants deliberately intended to inflict injury upon him. While it may be true that defendants knew that plaintiff suffered emotional distress when ordering him not to tell anyone of the digging incidents, there is no evidence that defendants intended their statements cause plaintiff emotional distress. Rather, viewing the evidence in a light most favorable to plaintiff, the alleged statements were made to conceal the digging incidents. Plaintiff admits as much by asserting that his involvement with the alleged cover up caused him emotional distress. Given plaintiff's own admission that defendants' threats against him were not intended to cause him mental harm, but to conceal their potential negligence, the trial court properly determined that defendants were entitled to summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

⁴ On July 16, 2006, the trial court granted defendants summary disposition pursuant to MCR 2.116(c)(10). This order supplemented the trial court's February 15, 2002, order granting defendants partial summary disposition and dismissed plaintiff's claim for intentional infliction of emotional distress in its entirety. Because review under MCR 2.116(C)(4) and MCR 2.116(C)(10) both requires a determination whether an issue of material fact existed, the court's grant of summary disposition pursuant to MCR 2.116(C)(10) is not fatal to review.